No. 83-103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WOODKRAFT DIVISION, GEORGIA KRAFT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

JOHN S. IRVING
CARL L. TAYLOR
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000
Attorneys for the Chamber of Commerce of the United States, as Amicus Curiae

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Section 7 of the National Labor Relations Act protects striker coercion against a nonstriking employee that, if engaged in by a union or its agents, would violate Section 8(b)(1)(A) of the Act.

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This brief amicus curiae is filed with the written consent of the parties in support of the position of the petitioner. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 200,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case—that of whether the National Labor Relations Board is statutorily empowered to order an employer to forgive coercion by striking employees against nonstriking employees—is of major importance to Chamber members. The right of an employer to continue operating during a strike may be severely undermined if employees who wish to work can be subjected to intimidation with impugnity by employees who are on strike. Moreover, the employer who continues to operate and invites employees to return to work has a legitimate interest in protecting employees who accept the invitation.

The Board's current rule, which requires not only striker coercion but coercion of sufficient intensity to satisfy the Board's *post hoc* judgment on the limits of tolerable misconduct, upsets the balance struck by Congress in 1947 when it amended the National Labor Relations Act to require that the right not to strike receive equal status with the right to strike. The Board's rule forgives conduct by striking employees that would be unlawful if committed by the striking union itself, clearly an intolerable result and one that should be reversed.

STATEMENT OF THE CASE

Two striking employees, Landis Bishop and Jeffrey A. Hughes, were discharged by the Georgia Kraft Company for misconduct during a strike by the Laborers' Local Union 246.

On the facts as stated by the Board, Bishop and Hughes went to the home of a nonstriking employee, William A. Walker, where the following occurred:

> The Administrative Law Judge found that Bishop and Hughes stood outside an open glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker [credited by the administrative law judge] testified that Bishop and Hughes were drunk, cursed, and

> said that he, Walker, was "screwing them out of their . . . damn money" by working during the strike. Walker also testified that Bishop said that he would "take care" of Walker if he returned to work—a statement repeated by Hughes. Finally, the Administrative Law Judge found that Walker asked them to leave early in the conversation, but that they "took their time doing so."

Georgia Kraft Co., 258 N.L.R.B. 908, 912-13 (1981).

The administrative law judge concluded from these facts that Bishop and Hughes had "threatened Walker with bodily injury," *id.* at 929, and that their discharge was warranted. *Id.* at 933. The Board disagreed on the basis that the misconduct in question was "an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge." *Id.* at 913. The Board added that the "remark about 'taking care' of Walker was ambiguous, and it was unaccompanied by violence or physical gestures." *Ibid.*

The Eleventh Circuit enforced the Board's order reinstating Bishop and Hughes as employees on the ground that "the Board is entitled to considerable deference in determining the scope of protected activity under section 7 of the Act. . . ." *Georgia Kraft Co. v. NLRB*, 696 F.2d 931, 939 (1983).[1]

ARGUMENT

The right to strike is a fundamental one under the National Labor Relations Act, but so is the right to refrain from striking. Both rights are given equal status by the language of Section 7 of the Act, 29 U.S.C. § 157, which speaks of the right of employees to engage in "concerted activities" or to "refrain from any or all of such

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[1] In dissent, Circuit Judge Clark stated, 696 F.2d at 940:

> I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home.

activities."[2] To protect the right to strike, Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights. To protect the right to refrain from striking, Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), makes it unlawful for a labor organization or its agents to "restrain or coerce" employees in the exercise of their Section 7 rights.

The original 1935 Act protected only the right of employees to act in concert without restraint or coercion by the employer, and was silent on the right of employees to refrain from concerted action without restraint or coercion from the union side. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The Act was amended in 1947 to recognize and protect the right to refrain from concerted activities by expanding the language of Section 7 and by adding Section 8(b)(1)(A). By these amendments, "Congress sought . . . to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal."[3] *Perry Norvell Co.*, 80 N.L.R.B. 225, 239 (1948), quoted with approval in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros., Inc.)*, 362 U.S. 274, 291 (1960). The amendments were expressly directed at stopping "coercion which prevented employees not involved in a labor dispute from going to

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[2] The only limitation on the right of employees to refrain from concerted activities is a valid union security clause in a collective bargaining agreement, as noted in Section 7 of the Act. That limitation is inapplicable when employees are striking to obtain a collective bargaining agreement, as was the case here.

[3] In 1947 Congress also added Section 8(c) to the Act which is commonly referred to as the "free speech" proviso. Importantly, that Section guarantees expressions of views, argument or opinion by unions and employers only "if such expression contains *no threat of reprisal or force* or promise of benefit." 29 U.S.C. 158(c) (emphasis supplied).

work." *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 189 (1967).

Although Section 7 recognizes an unlimited right of employees to refrain from striking, Section 8(b)(1)(A) does not expressly confer Board protection from coercion unless the coercion is performed by "a labor organization or its agents." This "gap" between the policy and enforcement sections of the Act has encouraged the Board to reduce the Section 7 protection of nonstriking employees by developing a scale on which to weigh the severity of the coercion by striking employees. The result has been to extend Section 7 protection to some forms of coercion against non-strikers, the very coercion that Section 7 was amended to eliminate. The Board has accomplished this result, as it did in the present case, by holding that an employer unlawfully coerces its striking employees when it discharges them because they have coerced its nonstriking employees.[4]

In weighing the severity of striker coercion, the Board generally has distinguished between threats and overt acts, protecting the former and proscribing the latter. For example, in *Midwest Solvents, Inc.*, 251 N.L.R.B. 1282 (1980), the Board required the reinstatement of a striking employee who had "threatened a farmer that he would blow up, or burn up, the farmer's combine if the farmer continued to make deliveries." *Id.* at 1282. The farmer continued to make deliveries, without interference. The Board, with the approval of the Tenth Circuit, held that "this isolated threat, unaccompanied by any attempt to interfere with the delivery, is the type of

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[4] The Board has reached this result despite Section 10(c) of the Act, 29 U.S.C. 160(c), which expressly forbids the Board from ordering reinstatement of individuals who are "suspended or discharged for cause." By ignoring Section 10(c) in a strike context, the Board "compel(s) employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of [coercion], which they would not have enjoyed had they remained at work." NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939).

minor misconduct which was in the contemplation of Congress when it provided for the right to strike." *Id.* at 1282, *enf'd*, 696 F.2d 763, 767 (10th Cir. 1982).

In contrast to the Eleventh Circuit in the present case and the Tenth Circuit in *Midwest Solvents*, the Third and First Circuits have refused to accept the proposition that Congress intended to prohibit all forms of coercion by unions but protect some forms of coercion by striking employees.

In *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527-28 (3d Cir. 1977), the court reviewed the inconsistent results reached by earlier striker coercion cases and concluded that the test for unprotected striker conduct should be the same as that for unprotected union conduct:

> Rather than focus on either the subjective intent of the striker or the perception of the "victim", we adopt an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate. In *Local 542, International Union of Operating Eng. v. N.L.R.B.*, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964), this court set forth the test for union coercion and intimidation in violation of Section 8(b)(1)(A):
>
> > That no one was in fact coerced or intimidated is of no relevance The test of coercion and intimidation is not whether the misconduct proved effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.
>
> *Id.* at 852-853. We believe that this standard which this Circuit has adopted in the closely analogous situation of Section 8(b)(1)(A) violations, is equally applicable to threats and intimidation by individual strikers. [Footnote omitted.]

The First Circuit has joined the Third Circuit in recognizing that "'threats are not protected under the Act.'" *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), quoting from *McQuaide*, 552 F.2d at 527. The First Circuit has also agreed with the Third "that an objective standard, denying protection to misconduct that in the circumstances reasonably tends to coerce or intimidate, is appropriate." *Associated Grocers*, 562 F.2d at 1336.

Measured by the objective standard of the Third and First Circuits, which we submit is the only standard consistent with the policies and structure of the Act, the conduct in the present case is clearly coercive. The Board itself grudgingly acknowledged the strikers' conduct to be "verbal intimidation." *Georgia Kraft Co.*, 258 N.L.R.B. at 913. Far from being "isolated," as the Board suggests, the intimidation was aggravated by a premeditated visit to the home of the nonstriking employee which drew his family into the intimidation scene. The legislative history of the 1947 amendments to the Act points to threats against families as a specific abuse that the Congress was determined to proscribe. *See NLRB v. Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, 285-86 (1960). Moreover, the threat to "take care" of the nonstriking employee if he returned to work was not only made, but repeated, during the confrontation at the door of the home. *Georgia Kraft Co.*, 258 N.L.R.B. at 912-13. The Board's dismissal of this threat as "ambiguous" shows how far the Board is willing to go to ignore the obvious.[5] The essential element of coercion is fear.

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[5] The incongruity between the Congressional purpose and the Board's approach is highlighted in A. Duie Pyle, 263 N.L.R.B. 744 (1982). There, strikers told a non-striker "your house is on fire" and "if it is not now, it will be Saturday." 263 N.L.R.B. at 744. The Board found the discharged strikers were entitled to reinstatement noting that their threats were not accompanied by "physical acts or gestures." 263 N.L.R.B. at 745. On the other hand, according to the Board, an employer violated Section 8(a)(1) of the Act by threatening "physical violence" when its superintendent told

In the context of the entire confrontation, there can be no doubt that the "we will 'take care' of you" remark would reasonably tend to instill in the nonstriking employee and his family a fear of the consequences if he returned to work. *See Georgia Kraft Co. v. NLRB*, 696 F.2d at 940 ("I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home") (Judge Clark dissenting).

CONCLUSION

Nothing in the history of the 1947 amendments to the Act gives support to the Board's conclusion that Congress intended to be more forgiving of striker misconduct than of union misconduct. If the use of fear is a weapon denied to unions by Section 8(b)(1)(A), it is not a weapon entitled to protection when used by striking employees on the ground that no one was actually harmed. The decision of the Eleventh Circuit, which assumes the existence of a discretion to forgive misconduct that the Board does not have, should be reversed.

Respectfully submitted,

JOHN S. IRVING
CARL L. TAYLOR
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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employees "those two [picketers] cannot stop you, and if they think they can, I'll throw both of their asses right out in the street." C. E. Wilkinson & Sons, 255 N.L.R.B. 1367, n.2 (1981).

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